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NO.

IN THE
SUPREME COURT OF THE
UNITED STATES

October Term, 19 ____

JOHN FUNEL, Petitioner

vs.

FIDELITY & CASUALTY COMPANY OF NEW YORK, Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

John Funel, your petitioner respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above entitled case on September 26, 1967, wherein rehearing was refused by that Court on November 28, 1967.

Opinions below.

Fifth Circuit: The opinion of the Court below in

this case (Record, infra, Pp. 793 to 801 is reported at 383 F. 2d 42.

The ruling of the Court below denying petitioner's application for a rehearing is set forth in Record, infra, Pp. 831.

District Court: The judgment of the District Court pursuant to the jury finding is set forth in Record, infra, Pp. 652, and the opinion of the District Court which was rendered pursuant to defendants' motions for judgment notwithstanding the verdict is set forth in Record, infra, Pp. 661, 667; neither were reported.

Jurisdiction

The judgment of the District Court (Record, infra, Pp. 652) was entered on January 26, 1965. A timely motion for judgment notwithstanding the verdict or in the alternative motion for new trial was denied on September 9, 1965 (Record, infra, Pp. 661 through 666.) A notice of appeal to the Court of Appeals for the Fifth Circuit was filed on October 6, 1965, and

the Record on appeal was docketed in that Court on January 6, 1966.

2. The case was argued and submitted to the Court of Appeals, Fifth Circuit, on November 8, 1966, (Record, infra, Pp. 792.) The judgment of the Court of Appeals reversing the judgment of the District Court and rendering judgment in favor of the defendant, was entered on September 26, 1967, (Record, infra, Pp. 801.) A petition for rehearing, timely filed, was denied on November 28, 1967, (Record, infra, Pp. 831.) The jurisdiction of this Court is invoked under 28 U.S. Code, Section 1254 (1).

QUESTIONS PRESENTED

Does a reversal of a jury finding of fact due to a speculative view of the case by the Court of Appeals constitute a deprivation of the right to trial by jury under the Seventh Amendment?

Does the reliance on a patently erroneous principle of State law by the Court of Appeals in a diversity case to reverse a judgment in favor of the plaintiff

constitute a denial to the plaintiff of equal protection of the laws of the state under the Fourteenth Amendment?

CONSTITUTIONAL, STATUTORY AND RULES PROVISIONS INVOLVED

The Seventh Amendment to the Constitution of the United States provides as follows:

> "In suits at common law, where the value in controversy shall exceed Twenty Dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law."

Section 1 of the Fourteenth Amendment to the Constitution of the United States provides as follows:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Section 1652 of Title 28 of the United States Code provides as follows:

> "The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the Courts of the United States, in cases where they apply."

Article 2315 of the Louisiana Civil Code provides in pertinent part as follows:

> "Every act whatever of man that causes damage to another obliges him by whose fault it happened to repair it." L.S.A.-C.C. Article 2315.

The Louisiana Direct Action Statute provides in pertinent part as follows:

> "The injured person or his or her survivors or heirs hereinabove referred to, at their option, shall have a right of direct action against the insurer within the terms and limits of the policy; and such action may be brought against the insurer alone or against both the insured and insurer, jointly, and in solido, in the parish in which the accident or injury occurred or in the parish in which the action could be brought against either the insured or the insurer under the general rules of venue prescribed by Art. 42, Code of Civil Procedure. This right of direct action shall exist whether the policy of insurance sued

upon was written or delivered in the State of Louisiana or not, and whether or not such policy contains a provision forbidding such direct action, provided the accident or injury occurred within the State of Louisiana." L.S.A.-R.S.22:655.

STATEMENT OF THE CASE

This diversity case arose in the Western District of Louisiana involving an industrial accident. It entered the Federal Courts under L.S.A.-R.S. 22:655, the Louisiana Direct Action Statute.

The case was tried by a jury and resulted in a verdict by the jury in favor of plaintiff and against defendant in the sum of $75,900.00, which was later reduced to $50,000.00, the limit of insured's coverage with defendant.

Defendant's motions for directed verdict, judgment n.o.v. and/or a new trial were denied and the trial judge assigned learned written reasons (Record, infra, Pp.661-666) for this action.

Defendant appealed to the Fifth Circuit making four assignments of procedural error, none of

which interdicted the substantive sufficiency, under Louisiana law, of the proof adduced and on which the jury acted. Defendant's assignments of error were briefed and argued to the Fifth Circuit by all parties.

The Fifth Circuit reversed the verdict of the District Court, pretermitting all assignments of error indulged in its own speculation as to how the accident might have occurred (Record, infra, Pp. 799) and found not enough proof, in its judgment, to satisfy it as to defendant's insured's fault.

In petition for rehearing, pertinent portions of the transcribed testimony set forth the uncontroverted admission by an employee of defendant's insured that he created the trap injuring plaintiff (Record, infra, Pp. 809). This admission, together with other select, salient testimony, pointed out the fault of defendant in creating the trap and inviting plaintiff into the place of danger with-

out warning, whereby his injuries were incurred. The Fifth Circuit, in its reasons for reversal, speculated on "factors independant of Acme's control (which) might have caused the accident." All such speculation was dehors the record.

The Fifth Circuit, on November 28, 1967, denied the petition for rehearing (Record, infra, Pp. 831.)

REASONS FOR GRANTING THE WRIT

The decision of the Fifth Circuit effectively denies any stature to the jury's findings of fact and relegates the deliberations of that body to a mere suggested solution of a puzzle. This emasculation of the Seventh Amendment cannot possibly be the law. The clearly delineated relationship of the reviewing tribunal in reevaluating factual determinations of the jury in our Federal judicial system was recently set out in Atlantic & Gulf Stevedores vs. Ellerman Lines, Ltd., U.S. Supreme Court, 1962, 82 S.Ct. 780,

369 U.S. 355, 7 L.Ed. 2d 798, reh.den. 825 S.Ct. 1137, 369 U.S. 882, 8 L.Ed. 2d 284, motion denied 83 S.Ct. 15, 371 U.S. 803, 9 L.Ed. 2d 51, wherein this Court stated:

> "We might agree with the Court of Appeals had the question of fact been left to us. But neither we nor the Court of Appeals can redetermine facts found by the jury any more than the District Court can predetermine them. For the Seventh Amendment says that 'no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.'
>
> Where there is a view of the case that makes the jury's answers to special interrogatories consistent, they must be resolved that way. For a search for one possible view of the case which will make the jury's findings inconsistent results in a collision with the Seventh Amendment. Arnold v. Panhandle & S.F.R.Co., 353 U.S. 360, 77 S.Ct. 840, 1 L.Ed. 2d 889. Cf. Dick v. New York Life Insurance Company, 359 U.S. 437, 446, 79 S.Ct. 921, 927, 3 L.Ed. 935."

The trial judge, who saw all of the witnesses and heard all of the evidence recognized the jurist's position vis-a-vis the jury in regard to determinations of facts when he succinctly said in refusing a judgment n.o.v.:

"Testing the evidence as we must, with all inferences most favorable to the jury verdict, we find that there was evidence which presented a jury issue as to proximate negligence on the part of Acme. This evidence consisted of testimony on the part of plaintiff as to the responsibility of Acme, and the testimony of plaintiff as to the admission of Moore, an employee of Acme, as to Moore's activities relative putting in place the plank.

The Court appreciates the clear distinction between its power to grant a judgment n. o. v. and its power to grant a new trial. The evidence here was certainly not overwhelming, but the question is: Was the verdict clearly or decidedly against the weight of the evidence? I do not think so. I am not free to re-weigh the evidence and set aside the verdict and grant a new trial merely because I might feel that other results would have been more reasonable." (Record, infra, Pp. 663, Line 10 et. seq.)

The Fifth Circuit itself recognized the constitutionally and judicially limited scope of appellate review when it stated in Massachusetts Bonding & Insurance Company v. DeBram, 5 Cir., Feb., 1962, 297 F.2d 858:

"It is not our province to determine whether the jury could have drawn different inferences or conclusions from the evidence presented or to decide what the court might have concluded or inferred if the case had been tried without a jury. Continental Casualty

Company v. Holmes, 5 Cir., 1959, 266 F. 2d 269, Cert. Den. 361 U.S. 877, 80 S. Ct. 140, 4 L. Ed. 2d 114; Gunning v. Cooley, 281 U.S. 90, 50 S. Ct. 231, 74 L. Ed. 720; DeZon v. American President Lines, Ltd., 9 Cir., 129 F. 2d 404; Boston & Maine R. R. v. Cabana, 1 Cir., 148 F. 2d 150, Cert. Den. 325, U.S. 873, 65 S. Ct. 1414, 89 L. Ed. 1991; Roth v. Swanson, 8 Cir., 145 F. 2d, 262, 265; Moore's Federal Practice, 2nd Ed., Vol. 5, at 2314-2315; Myers v. Reading Company, 331 U.S. 477, 485, 67 S. Ct. 1334, 91 L. Ed. 1615.

In considering all of the evidence, including the testimony of witnesses and the physical facts as shown by the exhibits and the testimony, we must construe the evidence most favorably to the appellees and give full effect to every legitimate inference therefrom and every reasonable conclusion based thereon. Carolina Life Insurance Company, et als v. Williams, 5 Cir., 210 F. 2d 477; Cert. granted, 348 U.S. 802, 75 S. Ct. 30, 99 L. Ed. 633; Phoenix Indemnity Company of New York v. Girouard, 5 Cir., 1958, 252 F. 2d 146; Fruit Industries, Inc. v. Petty, 5 Cir., 1959, 268 F. 2d 391; Norman Tobacco & Candy Company, Inc. v. Gillette Safety Razor Company, 5 Cir., 1959, 264 F. 2d 751."

The jurisprudence is replete with pronouncements from the United States Supreme Court and from the Circuits, wherein reviewing bodies refused to engage in searches for inferences which might not have occurred to the jury, and with hypothetical

questions which appellate judges might have posed had they been permitted to sit in the jury room.

The Fifth Circuit fell into error in this case by indulging in the temptation to be jurors. Inferences which gnawed at the Fifth Circuit were embodied in factors which "might have caused the accident," and were stated thusly by that Court in its opinion:

> "Here any number of factors independent of Acme's control might have caused the accident. Employees of the plant owner or of the building contractor may have tampered with the board after Moore replaced it. Something may have fallen on it. Or Funel may simply have stepped on it in an unusual way.." (Record, infra, Pp. 799)

Further error was occasioned by questions which piqued the curiosity of the judges and were asked by them in their reversing opinion. The doubts are these:

1) Did Moore or any other Acme employee fail to use due care in replacing the board?

2) Did the manner in which Moore replaced the board cause the accident?

3) Did some intervening force cause the board to become unstable?

It is not the nature of contested litigation that truth shall come clear as light from Sinai by Divine Revelation. The jury must seek the truth from amidst shreds and bits and pieces. The truth was found and the questions of the jury and of the Fifth Circuit were answered in the testimony of Funel and the admission of Moore. The testimony presented to the jury and contained in the transcript establishes a series of events and failures to disclose action which, coupled with the reliance of Funel thereon, constitute the culpable negligence of Acme and the proximate cause of Funel's injury.

Funel established that the board was imbedded in the corkscrew blades to his knowledge. See Stockwell cross-examination Tr. 270, Line 6 et. seq.:

"Q. And you knew that this board was just laying on these twin screws that you are talking about, isn't that right?

A. Everybody went in.

Q. Well, I am asking you if you knew it was just laying on these twin screws?

A. I knew it was in there and I knew it was imbedded and it was solid when I went in."

Funel established that the board had become imbedded over a period of weeks. See direct examination Tr. 130, Line 16 et seq.:

"Q. Do you recall the method of holding the boards still?

A. Well, the board, it had wedged in, to a certain extent. Now I couldn't say exactly how deep, but it was pretty solid, because there were so many people that went in and out of it had been in there for weeks, could be three or four or five weeks easy, maybe six, so it was pretty solid."

Funel established that the board had been in place and used by him and by Acme employees during the entire day prior to the accident. See Tr. 139, Line 8 et seq.:

"Q. Did you go into the vault?

A. Oh, yes, quite a few times.

Q. On Monday?

A. Oh, yes, sir.

Q. What means did you use to get into the vault on Monday?

A. I went in through this little door and got over the motor and over the next motor with the gear box, and turned around, stepped on the board, and got right back into the bin.

Q. That was the standard way?

A. That's the way I got in every day I went.

Q. Did you have any difficulty on Monday getting in?

A. Not a bit.

Q. When was the last time, if you recall, when was the latest time on Monday that you went into that vault?

A. We must have been in there just before knocking off time Monday evening because we were talking about this particular set-up that we were going to finish the next day.

Q. When you say 'we', please tell us who you mean, sir.

A. I was talking with Linton David that evening and Lionel Moore, he was there, and a couple of other people, I don't recall, I don t remember.

Q. When you left on Monday, had any change been made?

A. No, not a thing."

Funel established that Moore, an Acme employee, invited him into the vault on Tuesday morning and gave no warning of any change in the plank bridge. See Tr. 141, Line 20 et seq.:

"A. Then we went over some plans there and he was having a little difficulty about the control that was by the compressor in the engine room, so then we walked over to the engine room and we were going over this particular control and Lionel Moore came in there and asked me if I would come inside the vault, that he was having trouble, or the ice bin, he was having trouble, he couldn't get the deflector to line up.

THE COURT: That's Lionel Moore?

THE WITNESS: Lionel Moore, yes, sir.

THE COURT: Said, 'Come on into the vault?'

THE WITNESS: Yes, sir, or the ice bin.

THE COURT: All right, sir.

A. and I told him all right, I would be there in a little while, . . ."

Funel established in detail his means of entry into the vault, his view of the board, how he stepped on the board and how the board turned under him as a

result of its being removed from its imbedded position. See. Tr. 143, Line 11 et. seq.:

"Q. All right. Then when you were finished with your conversation with Giles about the thermometer, what happened?

A. I walked over, went through the door, got over the motor, over the gear box, turned around on the other gear box--

Q. Let me ask you: When you say 'turned around', are you standing erect on the motor?

A. Oh, no. When I would get in the box and walk in, then around and I would put my foot down to get in, you see.

Q. Were you in a standing position?

A. I was in a standing position, that's right. Then I would stoop and put my foot down to get in, because I had to go down about, oh, I would say between twenty and thirty inches, to get to the board.

Q. And you put your foot down and what happened?

A. When I put my foot down on the board, the board let go and I fell down.

Q. Now, you say you put your foot down on the board?

A. Yes, sir.

Q. Did you see the board?

A. Yeah, I saw the board before I put my foot on it; it was there.

Q. Did it look unusual?

A. Not that I could notice.

Q. Do you remember which foot you stepped on?

A. Yes, sir, my left one.

Q. Now, tell us in as much detail as you can what happened when you put your foot on the board.

A. Well, when I put my foot on the board and as I let go, to stand up to get in, the board let go and I fell over the knives, over the twin screws, and I hit my knee and turned my ankle, too; everything hurt me.

THE COURT: Just a moment, sir. I didn't quite get that. You put your foot on the board and then what happened?

THE WITNESS: Then the board turned over; it went like--you know, it tilted up sideways like, and I went over this way, you see. In other words, two screws are here and I went to this side.

THE COURT: Did you fall down? What happened? How did you fall or what?

THE WITNESS: Yes, sir, I fell down.

THE COURT: How far did you fall down?

THE WITNESS: It's only about--well, from the top of the screw down, it's only about fourteen inches, but I fell in a position that I hit my knee across these blades as I fell down. I had about three cuts, I had one above my ankle and I had about two right in the vicinity of my knee.

THE COURT: Now, as I understand it, you previously described this board I think you told me it was--you were talking to us, you didn't tell me, but in the presence of everybody else here, you testified a while ago that the board was four to six feet long?

THE WITNESS: Yes, sir.

THE COURT: It was about one inch thick and six to eight inches wide?

THE WITNESS: Yes, sir.

THE COURT: It was about one inch thick and six to eight inches wide?

THE WITNESS: I said about one and a half inches thick.

THE COURT: One and a half inches thick and six inches wide. All right.

BY MR. NELKIN:

Q. Now, when the board --

THE COURT: The board--do I understand, sir, that if this were the board, that when you stepped on it, did it go up like this, or did it go to the side like this?

THE WITNESS: It went like this, sideways; it tilted.

THE COURT: It flipped?

THE WITNESS: It flipped and went in between the blade on the edges.

THE COURT: And you fell fourteen inches?

THE WITNESS: Yeah.

THE COURT: And your knee hit the blades?

THE WITNESS: I had three cuts, three cuts that actually had a little blood on it."

Funel established the location in the vault of the two Acme employees, Moore and Taylor, neither of whom were called by Acme, despite their presence in Court. See Tr. 147, Line 16 et seq.:

"A. Yes, sir. Lionel Barrymore--I mean Lionel Moore was the first guy that was next to me when I fell down; he was the fellow that helped pick me up. And Jack

Taylor was right above where I fell, which would be roughly about twelve feet."

Funel established that Moore, the Acme employee, made the admission that he created the trap by replacing the board atop the screws. See Tr. 150, Line 6 et seq.:

"A. I said to Lionel Moore, 'What happened to the board,' and he said, 'Well, I had to replace it this morning. It wasn't in place, and I said, 'Well, why wasn't it in place, and he says, 'Well, somebody must have moved it.' He said, 'I just put it back.' "

Funel established that he could notice no difference in the condition of the board as he stepped into the vault. See Tr. 298, Line 2 et seq.:

"Q. Was it in relatively the same position on the screw that it had been the day before, or the week before?

A. It was on the screw, it was on the screw.

Q. Did you detect any difference?

A. Before I stepped in?

Q. Before you stepped in.

A. No."

Funel established that only Acme employees were in the vault. See Tr. 292, Line 6 et seq.:

"A. David's men was working on the deflectors and they had--I think they had some men on the end of the dock that might have been working on some conveyors out there, which would be Dyson's men; I am not positive, but I think they had somebody out there."

Funel established that Moore, the Acme employee, preceded him into the vault. See Tr. 278, Line 21, et seq.:

"Q. So actually, when you went there, as I understand your testimony, you went in by yourself and Lionel Moore had already been in, you would say, twenty minutes?

A. Well, I don't know if he was in there twenty minutes, but he was in there when I got in; he was already in.

Q. He wasn't going in behind you or in front of you, he was already in there?

A. He was already in, yes, sir."

Funel thus proved by sworn, uncontroverted testimony, obviously believed by the jury and by the Judge below that a condition of safety had been created and relied on, which condition was changed without warn-

ing to one peril by an employee of Acme, and Funel was invited into the situation of peril by that employee of Acme, and he sustained the injury complained of as a direct and proximate result of the causative action of the employee of Acme.

The only defense urged by the defendant was the totally disbelieved testimony of a bribe attempt.

THE SUBSTANTIVE LAW OF LOUISIANA UNEQUIVOCALLY JUSTIFIED THE JURY'S VERDICT HEREIN AND THE TRIAL JUDGE'S REFUSAL OF THE JUDGMENT NOTWITHSTANDING THE VERDICT, AND GIVES NO CREDENCE TO THE POSITION OF THE APPELLATE COURT.

The doctrine of Erie Railroad Company v. Tompkins, U.S. Sup. Ct., 1937, 58 S. Ct. 817, 304 U.S. 64, 84 L. Ed. 1188, 114 A. L. R. 1487, conformed to 98 F. Ed. 49, Cert. den. 59 S. Ct. 108, 305 U.S. 637, 83 L. Ed. 410, reh. den. 59 S. Ct. 229, 305 U.S. 673, 83, L. Ed. 436, and Section 1652 of Title 28 of the United States Code:

> "The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in Civil Actions in the Courts of the United States, in cases where they apply."

require that the decision of the Fifth Circuit herein be reversed as that decision is not conformable with the laws of the State of Louisiana as pronounced by that state's appellate courts.

Funel was representing his employer, Equitable Equipment, Inc. on the jobsite and giving advice as to installation of equipment sold by it. He was asked to answer a question requiring that he use the plank bridge which had been safely wedged. Without Funel's knowledge the condition of the bridge had been materially altered by Moore, Acme's employee, making it unsafe and a trap. This culpable action Moore confessed. Moore's statement was admitted by the trial court as an admission against interest. It was this creation of a trap which was the nexus between action

and fault. The Louisiana rule as to liability to one injured by a trap is setout in Allien v. Louisiana Power & Light Company, La. App. 3 Cir., 1967, 202 So. 2d 704, wherein that Court stated:

> "Applicable here is the rule that a person with no actual knowledge or implied knowledge of the danger has a right to rely on those who have a duty to protect his safety. This rule is stated in Norman v. Piazza, 145 So. 2d 110 (La. App. 4 Cir., 1962) as follows:
>
> > 'Moreover, in the absence of knowledge of the danger or a threat of danger, a person may rely upon the care of others who are duty bound to avoid injury to him, and, thus, he may assume that he is not exposed to or threatened by danger, which can come to him only from a breach of duty which others owe to avoid injury to him-however, such duty arises whether by statute, or from contract, or from the relationship of the parties. 65 C.J.S. Negligence, Section 118, P. 711 et seq.' "

The Louisiana Court of Appeal for the Second Circuit in Kavanaugh v. Travelers Insurance Company, La. App. 2 Cir., 1967, 203 So. 2d 780, defined "trap: as follows:

> "A 'trap' on which liability may be based involves a concealed, dangerous condition which, being unknown to a party using the premises, could not have been avoided by reasonable care."

In Foggin v. General Guaranty Insurance Company, S. Ct. La., 1965, 250 La. 347, 195 So. 2d 636, the Court considered a case where a guest asserted a claim against her host to recover for personal injury sustained on the host's property as a result of tripping over a plank nailed across a gate by the host. The Supreme Court of Louisiana found favorably for the claimant and stated:

> "Each case must be decided on its own facts and circumstances. Pilie v. National Food Stores of Louisiana, Inc., 245 La. 276, 158 So. 2d 162. We do not find that the board in the instant case constituted a trap, nor that it was a vice in construction. However, it was an obstacle and obstruction to unimpeded passage or walking through the gateway...
>
> Mrs. Catherine Foggin was not an insurer of her mother-in-law against the possibility of accident. Daire v. Southern Farm Bureau Casualty Ins. Co., La. App., 143 So. 2d 389. However,
>
> 'An invitee is a person who goes on the premises with the express or implied invitation of the occupant on the business of the latter or for their mutual advantage; and to him, the duty owed is that of reasonable and ordinary care, which includes the prior discovery of reasonably discoverable conditions of of the premises that may be unreasonably dangerous, and correction thereof

or a warning to the invitee of the danger.'

Alexander v. General Accident Fire and Life Assurance Corp., La. App., 98 So. 2d 730.

'The owner, occupant, or person in charge of property owes to an invitee the duty of exercising reasonable or ordinary care for his safety and is liable for injury resulting from breach of such duty. This duty includes that of exercising reasonable care to keep the premises in a reasonably safe and suitable condition or of warning invitees ...of hidden or concealed perils of which he knows or should know in the exercise of reasonable care, so that those whom he has invited to enter upon or use his property shall not be unnecessarily or unreasonably exposed to danger...'

Savell v. Foster, 149 So. 2d 210. (Emphasis ours.) Therefore, under the facts found and the jurisprudence, we are impelled to conclude that Mrs. Catherine Foggin was negligent in not warning her mother-in-law of the existence of the board, and that her failure to give such warning was the proximate cause of the instant accident."

The requirements of proof by Louisiana Appellate Courts of industrial accidents was strikingly set forth in Delafosse v. Industrial Painters, Inc., La. App. 3 Cir., 1967, 199 So. 2d 559:

"The accident at work can be established by the

testimony of the claimant alone, especially where as here there are corroborating circumstances. Hayes v. Louisiana Irrigation & Mill Co., La. App. 3 Cir., 168 So. 2d 396, and authorities cited. Prior compensation claims or prior injuries may be taken into account in weighing credibility as to the claimant's testimony of the present accident or disability, but nevertheless the trial court's ultimate evaluation will not be disturbed on review in the absence of manifest error. Mercantel v. White Painting Co., La. App. 3 Cir., 171 So. 2d 748...

Under these principles, we will not disturb the trial court's conclusion that the uncontradicted lay testimony and the corroborating circumstances, as well as the great preponderance of the medical testimony, support a finding of total and permanent disability resulting from an accident at work.

The defendants-appellants urge, however, that an unfavorable inference should be drawn from the claimant's failure to call a co-employee who was present when he felt the sharp onset of the back pain, in order to corroborate his testimony of the accident at work. Nevertheless, we are unable to find the claimant's failure to call this co-worker justifies reversal of the trial court's factual findings as manifestly erroneous.

In the first place, the co-employee's testimony was equally available to the employer, and there is no unfavorable inference to be drawn from a claimant's failure to call a co-employee merely to corroborate his own

testimony. Meshell v. Sabine Lumber Co., La. App. 3 Cir., 137 So. 2d 70. Further, a litigant is required only to prove his case by a preponderance of the evidence and, if as here he does so, no unfavorable inference attaches to his failure to call additional witnesses. Haynes v. Modern Woodmen of America, La. App. 3 Cir., 135 So. 2d 548. Finally, even when an unfavorable inference attaches from a failure to call a witness, by itself it will not outweigh sworn evidence accepted as credible by the trier of fact. Evers v. State Farm Mut. Auto. Ins. Co., La. App. 3 Cir., 187 So. 2d 217; Pierre v. Galloway, La. App. 1 Cir., 96 So. 2d 916."

There was evidence that an employee of the defendant altered the position of the plank bridge and knew or should have known that the board was, thus, unsafe. There was evidence that the defendant's insured was a contractor on the premises and thus occupied the premises, wherein Funel was injured. Under Louisiana law nothing more need have been established than was presented to the jury and on which the jury found liability.

It is worthy of note that the defense offered by the insurer was one of a bribe attempt which was totally rejected by the jury and wholly dis-

believed. It is also worthy of note that the application to the Fifth Circuit for review by the insurer addressed itself to procedural issues only, and at no time questioned the adequacy of proof of fault.

CONCLUSION

The decision below is patently erroneous. For the reasons stated above, this decision raises a question of general importance as to the persuasiveness of jury findings on facts, which, coupled with the gross and grievous deviation of the decision from applicable substantive law of the State of Louisiana should be reviewed by this Court. The general interest in the future position of such jury findings in the Fifth Circuit, together with the question of pure equity in the case of the injured applicant herein justify the granting of certiorari.

Respectfully submitted,

Ellis C. Irwin

Joseph W. Nelkin

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NO. 1151

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IN THE
SUPREME COURT OF THE
UNITED STATES

October Term, 1967

JOHN FUNEL, Petitioner

VS.

FIDELITY & CASUALTY COMPANY OF NEW YORK, Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

APPENDIX CONTAINING ALL OPINIONS AND JUDGMENTS DELIVERED BY UNITED STATES DISTRICT COURT AND THE UNITED STATES COURT OF APPEALS

Ellis C. Irwin

Joseph W. Nelkin

801 Baronne Building
305 Baronne Street
New Orleans, Louisiana
70112
Attorneys for Petitioner

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APPENDIX

OPINIONS BELOW

1. The opinion of the United States Court of Appeals for the Fifth Circuit (Record, infra, Pps. 793 to 801) reported at 383 F. 2d 42:

(Pps. 793 to 801)

"WISDOM, Circuit Judge: The diversity

case, arising under the Louisiana Direct Action Statute,[1] concerns an industrial accident which occurred in Cameron, Louisiana, in 1961. The jury returned a verdict in favor of the plaintiff, John Funel, in the amount of $75,900.[2] The insurance company appeals, urging among other grounds that the trial court should have upheld its plea of prescription and that the court erred in admitting certain hearsay evidence. These contentions present nice questions of law, but we do not reach them. We reverse because there was no evidence of the defendant's negligence.

The trial below was not an ordinary one. On the question of liability there were only three witnesses—Funel, Fred Duhon, an employee of the plant where the accident occurred, and an insurance ad-

juster. Funel was the only witness to testify that the accident occurred. Duhon testified that Funel offered him a bribe to tell anyone who should inquire that an accident had in fact taken place. In rebuttal, the insurance adjuster testified that in a routine interview after the alleged bribe attempt Duhon did not mention the incident.

The accident occurred in the course of the construction of an ice plant. Funel, a sales engineer for the Equitable Equipment Company, had sold the refrigeration and other necessary machinery to the Steed Ice Company, the owner of the plant. The defendant's insured, Acme Refrigeration Company, had the contract to install the machinery while another outside contractor had the contract to construct the building to house it. Funel worked with the owner and the contractors as a general trouble-

shooter.

The accident occurred as the project neared completion. According to Funel's testimony, one of Acme's employees, Lionel Moore, asked him to come into the ice bin to take a look at a problem. The only way to enter the bin was to crawl over some machinery, turn around, and climb down onto a board which had been placed longitudinally between two parallel ice-moving corkscrews. Funel had entered the bin innumerable times by this method and had always found the board sturdy. This time, however, the board twisted and Funel fell, striking his knee on one of the corkscrews.

Funel testified that the screws had been in place for four to six weeks and that the board had simply been placed atop them. Because of the frequent passage of workmen

over the board, it had become wedged between the screws, so that it was quite steady. This was its condition the night before the accident.

The morning of the accident someone removed the board in order to work on the screws. That person or someone else then replaced it in its original position. The only evidence concerning the replacement of the board was Funel's testimony that after the accident, More told him that he (Moore) had put the board back.[3] There was no other testimony as to Acme's negligence.

At the close of the plaintiff's evidence and again after all the evidence had been presented, the defendant moved for a directed verdict on the ground that Funel had failed to prove negligence on the part of Acme. The defendant renewed this

objection in its motion for a judgment notwithstanding the verdict. The district court denied all three motions.

We have examined the record thoroughly. Viewing the evidence in the light most favorable to the jury's verdict, Funel proved only two things. First, at some time during the morning of the accident, an Acme employee replaced the board after it had been removed. Second, an accident occurred when Funel stepped on the board. The evidence fell far short of proving that Acme was negligent. There was no proof of the manner in which Moore replaced the board. There was no proof when he did so or that no one had moved it subsequently. Cf. Terrill v. ICT Ins. Co., La. Ct. App. 1 Cir. 1957, 93 So. 2d 292. There was no proof that Moore knew or should have known that the board was unstable. In fact Funel

testified (1) that other workmen were in the bin, apparently having used the board without incident, and (2) that the board looked all right to him.

In this diversity case we are, of course, bound to follow Louisiana negligence law. Although the law is governed by Articles 2315[4] and 2316[5] of the Civil Code, the requirements for proving negligence are basically the same as in a common law jurisdiction. The plaintiff has the burden of proof. He must prove fault. Brown v. Liberty Mutual Ins. Co., 1958, 234 La. 860, 101 So. 2d 696. He must prove that his injury resulted proximately from the defendant's fault. See, e.g., New Orleans & N.E.R.R. v. McEwen, 1897, 49 La. Ann. 1184, 22 So. 675. Negligence is not presumed from the mere happening of an accident. See Morales v. Employers

Mutual Liability Assurance Corp., 1943, 202 La. 755, 12 So. 2d 804; Day v. National U.S. Radiator Co., 1961, 241 La. 288, 128 So. 2d 660. 'It is the duty of the plaintiff to prove negligence affirmatively...' Morales v. Employers Mutual Liability Assurance Corp., supra, 12 So. 2d at 808.

The evidence here can support neither a direct finding of negligence nor the application of the doctrine of res ipsa loquitur. Funel offered no evidence to show that Moore or any other Acme employee failed to use due care in replacing the board. He proved only that Moore replaced the board. Funel offered no evidence to show that the manner in which Moore replaced the board caused the accident. He proved only that the accident occurred subsequent to Moore's replacing the board. Funel

offered no evidence that some intervening force had not caused the board to become unstable. In short, Funel offered no evidence whatsoever to show the breach of a duty or proximate cause.

Similarly, there was insufficient proof to call into play the res ipsa loquitur doctrine. There was no evidence to show that Acme had exclusive control of the board or of the premises, or that this was the sort of accident which does not occur in the absence of negligence. Res ipsa applies when the proof allows 'no room for a different presumption...' Morales v. Employers Mutual Liability Assurance Corp., supra, 12 So. 2d at 808. 'The rule will not be applied where the evidence discloses that the injury might have occurred by reason of the concurrent negligence of two or more persons

or causes, one of which was not under the management and control of the defendant.' Pilie v. National Food Stores of Louisiana, Inc., 1963, 245 La. 276, 158 So. 2d 162, 164.

Here any number of factors independent of Acme's control might have caused the accident. Employees of the plant owner or of the building contractor may have tampered with the board after Moore replaced it. Something may have fallen on it. Or Funel may simply have stepped on it in an unusual way.[6] The plaintiff apparently recognized the weakness of this argument, for although he pitched his cause in terms of res ipsa, he did not explicitly invoke the doctrine. The court did not charge the jury on it.

Funel seems to have relied below on the theory that the owner or occupier of

property has the duty to warn invitees of unsafe conditions which are not readily apparent. We do not reach the question whether Louisiana would apply that principle to a construction site where, of course, unsafe conditions abound. The defendant's insured was not an owner or occupier of property. Acme was merely a contractor, working with other contractors, on premises owned and occupied by another. Furthermore, there was no evidence whatsoever that Acme or any of its employees knew or should have known that the board was unsafe.

We hold that reasonable men could not conclude from the evidence in this record that Acme had been negligent. The district judge should have granted the defendant's motions for a directed verdict. We therefore REVERSE the

judgment of the district court and RENDER judgment in favor of the defendant.

Footnotes:

1) LSA-RA, Section 22:655.

2) The verdict was later reduced to $50,000, the limit of the insured's policy with the Fidelity and Casualty Company of New York.

3) It was to this testimony that the defendant objected on the ground it was hearsay. The district court held that Moore's statement did not fall within the res gestae exception to the hearsay rule, but that it was a vicarious admission against Acme's interest, and could come under that exception.

The defendant contends here that Louisiana law governs the admissibility of this evidence, because the question is really one of agency rather than of evidence. We disagree. This Court has taken the position that Federal

Rules of Civil Procedure 43(a) governs the admissibility of evidence in federal courts, and that the Rule should be interpreted to favor the admissibility of the evidence. Monarch Ins. Co. v. Spach, 5 Cir. 1960, 281 F.2d 401; Dallas County v. Commercial Union Assurance Co., 5 Cir 1961, 286 F.2d 388; Hambrice v. F.W. Woolworth Co., 5 Cir. 1961, 290 F.2d 557. The Supreme Court's decision in Hanna v. Plumer, 1965, 380 U.S. 460, 85 S.Ct. 1136, 14 L.Ed. 2d 8, supports our conclusion that federal law rather than state law should govern. See also the excellent discussion in Comment, Federal Rule 43(a); The Scope of Admissibility of Evidence and the Implications of the Erie Doctrine, 62 Colum. L.Rev. 1049 (1962).

We note, without deciding, that there is a strong argument that Moore's declaration

was not hearsay at all. Moore was present during the entire trial and was therefore available for cross examination. Because the exclusion of hearsay is in large part based on the lack of an opportunity to cross examine, there is little reason to classify as hearsay an extrajudicial declaration made by one who is physically present and available for cross examination during the trial. See American Law Institute, Model Code of Evidence, Rule 503 (b) (1942); Maguire, The Hearsay System: Around and Through the Thicket, 14 Vand. L. Rev. 741, 767-68 (1961).

While the plaintiff had the same opportunity to call Moore as did the defendant, the problem seems to be one of the assigning the burden. Rule 43(a)'s presumption in favor of admissibility casts the burden of calling the declarant upon the party making the

hearsay objection.

4) Art. 2315. Every act whatever of man that causes damage to another obliges him by whose fault it happened to repair it.

5) Art. 2316. Every person is responsible for the damage he occasions not merely by his act, but by his negligence, his imprudence, or his want of skill.

6) This case is analytically similar to one branch of the Pilie case, supra. There the plaintiff proved that employees of the Coca-Cola company had stacked a display in a supermarket and that the following day several cartons of bottles fell from the display injuring her. The Court of Appeal held that because there was no proof that the Coca-Cola employees had acted negligently and because so many other factors could have led to the display's instability, the defendant was entitled to a directed verdict. La. Ct. App. 1 Cir.

1962, 148 So. 2d 391, aff'd, 1963, 245 La. 276, 158 So. 2d 162."

The ruling of the United States Court of Appeals for the Fifth Circuit denying petitioner's application for a rehearing found in Record, infra, Pp. 831 is as follows:

(Pp. 831)

"You are hereby advised that the Court has today entered an order denying the Petition for Rehearing in the above case. No opinion was rendered in connection therewith."

The judgment on the merits of the United States District Court for the Western District of Louisiana pursuant to the jury finding is found in the Record, infra Pp. 652 and is as follows:

(Pp. 652)

"JUDGMENT

This action came on for trial before a jury, and the issues having been duly tried and the jury having duly rendered its verdict.

IT IS ORDERED AND ADJUDGED

that the plaintiff, John Funel, recover of the defendant, Fidelity & Casualty Company of New York, the sum of Fifty Thousand and No/100 Dollars, with interest thereon at the rate of five percent (5%) as provided by law; and his costs of action.

Dated at Lake Charles, Louisiana, this 26th day of January, 1965.

/s/ Edwin F. Hunter, Jr.
United States District Judge

Filed January 27, 1965
Alton L. Curtis, Clerk
U.S. District Court
Western District of Louisiana"

The opinion of the United States District Court for the Western District of Louisiana which was rendered pursuant to defendants' motions for judgment notwithstanding the verdict set forth in Record, infra Pp. 661-666, is as follows:

(Pp 661-666)

"HUNTER, JUDGE:

Alleging that permanent and disabling injuries resulted from the proximate negligence

of Acme Refrigeration Company, plaintiff, utilizing Louisiana Direct Action Statute, brought this action against Acme's liability insurer, Fidelity and Casualty Company of New York.

The case was tried to the jury and resulted in a verdict by the jury in favor of plaintiff and against defendant in the sum of $75,900.00. This amount was reduced to $50,000.00 because that was the extent of coverage.

At the close of plaintiff's case defendant filed a motion for a directed verdict. Defendant filed a similar motion at the close of all the evidence. These motions were denied and the case submitted to the jury. Subsequent to the verdict, defendant filed a timely motion to grant defendant a judgment notwithstanding same and/or a new trial.

The law applicable is well established and multiplying authorities would be superfluous. It may be summarized: The fact-finding power belongs to the jury. This power includes the determination of all questions of fact, and the drawing or rejection of inferences from facts. Both negligence and proximate cause are for the jury to find or reject, and the findings of the jury are not to be disturbed wherever they rest upon some evidence, or upon a reasonable inference or conclusion based upon some evidence. Neither conflicting evidence nor conflicting inferences are to be re-weighed or considered by the trial judge in testing the verdict. The sole question in testing the verdict is whether there is any evidence in the record, or any reasonable inference from any evidence in the re-

which, if believed, would authorize a verdict against defendants.

Defendant energetically and earnestly contends that there is no evidence of proximate negligence on its part. We disagree.

Testing the evidence as we must, with all inferences most favorable to the jury verdict, we find that there was evidence which presented a jury issue as to proximate negligence on the part of Acme. This evidence consisted of testimony on the part of plaintiff as to the responsibility of Acme, and the testimony of plaintiff as to the admission of Moore, an employee of Acme, as to Moore's activities relative putting in place the plank.

The Court appreciates the clear distinction between its power to grant a judg-

ment n.o.v. and its power to grant a new trial. The evidence here was certainly not overwhelming, but the question is: Was the verdict clearly or decidedly against the weight of the evidence? I do not think so. I am not free to re-weigh the evidence and set aside the verdict and grant a new trial merely because I might feel that other results would have been more reasonable.

The very serious issue raised by defendant's motion is whether this Court committed error in permitting Funel to testify that Lionel Moore, an employee of Acme, told him immediately after the accident that he, Moore, was the party who placed the faulty board in its position on the very morning of the accident. Absent this testimony, plaintiff presented no issue for the jury.

This was not an ordinary trial. Plaintiff called one witness, the plaintiff himself. Plaintiff's testimony included his version of the Moore admission. Defense counsel called only one witness, Fred Duhon, whose testimony was substantially that of his handwritten statement, to-wit:

> 'John Funel come to me on the Job and aske me if I would like to make a couple of 1000 dollars or more I answered him why of course any one would like to make money. he said all you have to do is tell any one who comes and askes you if any one got hurt here to say yes. I told him no. I would not lie for him or any one.'
>
> 'Fred Duhon'[1]

Lionel Moore, the man who allegedly made the admission, was present in the witness throughout the trial. No one called him.[2]

Did the Court err in letting Funel testify as to what Moore, an employee of

of Acme, said relative his, Moore's activities?

Defendant relies heavily upon Vicksburg and Meridian R.R. Co. v. O'Brien, 119 U.S. 99, 7 S.Ct. 172 (1886). That case, with four dissents, has been eroded over the years and cannot today be regarded as a statement of contemporary law. See Judge Morris' discussion in Martin v. Savage Truck Line, Inc., 121 F.Supp. 417; Grayson v. Williams, 256 F. 2d 61. We think that the statement of Moore made to Funel was admissible as an admission against interest. Wabisky v. D.C. Transit System, Inc., 305 F.2d 317; Koninklijke Luchtvaart Maatschappij NV KLM Royal Duch Airlines Holland v. Tuller, 110 U.S. App. D.C. 282, 292 F. 2d 775, cert. denied, 368 U.S. 921, 82 S.Ct. 243, 7 L.Ed. 2d 136 (1961). See

McCormick, Evidence, Sect. 244 at 517-19 (1954). Also see La. & Ark. R.R.Co. v. Johnson, 214 F.2d 290 (5 Cir. 1954).

Defendant's motion to set aside the Court's instructed verdict in favor of Casualty Reciprocal Exchange should also be denied. The record is devoid of any evidence showing any negligence on the part of Dyson Lumber Company, 3rd party defendant's insured.

For reasons stated, the Clerk will enter forthwith an Order denying defendant's motions.

THUS DONE AND SIGNED at Lake Charles, Louisiana on this the 9th day of September, 1965.

/s/ Edwin F. Hunter, Jr.
United States District Judge

Filed September 10, 1965
Alton L. Curtis, Clerk
U. S. District Court
Western District of La.

Footnotes:

1) The above language is copied from Funel Exhibit 17, which is in essence the testimony of Mr. Duhon.

2) Counsel for plaintiff subsequently tried to call Moore in rebuttal. Defense counsel objected and the objection was sustained. This ruling was made necessary by the fact that there was nothing to rebut. Defendant had called only one witness, and his only testimony concerned the plaintiff's approaching him as a witness. However, counsel for plaintiff did make an offer of proof which appears at pages 368-369 of the record. The essence of this offer was that Moore, if permitted, would have testified that he invited plaintiff into the vault without notifying the plaintiff of the substantial changes which had taken

place in the vault, and that the plaintiff did step upon the plank, did fall to the floor, whereupon Moore assisted the plaintiff and admitted to the plaintiff that he, Moore, did place the board in question on the twin-screw conveyor on the morning of the accident."